

ON July 11 2019 Hall was served a Federal Detainer  
For conspiracy To possess with Intent To Distribute  
methamphetamine Title 21 USC §§ 846, 841(a)(1)

ON July 31 2019 Hall appeared Before District Judge  
Clifton L. Corker and entered a plea of not guilty  
To conspiracy To Distribute 50 grams or more  
of methamphetamine its salts, isomers and salts  
of isomers a schedule II controlled substance  
IN violation of Title 21 USC §§ 846, 841(b)(1)(A)(Viii)

Hall argues This court To Issue an order  
declaring a categorical policy disagreement with  
The purity-Driven methamphetamine sentencing guidelines

## Discussion

IN UNITED STATES V. BOOKER, 543 U.S. 220 245 125 S.Ct 738, 160 L.Ed.2d 621 (2005) The supreme court held that

The United States sentencing guidelines ("guidelines") are "effectively advisory" and that they "serve as one factor among several courts must consider in determining the appropriate sentence." Kimbrough v. United States 552 US 85, 90, 128 Sct. 558, 169 L.Ed. 2d 481 (2007)

Although advisory, the guidelines remain the "starting point and the initial benchmark" for sentencing.

Gall v. United States 552 US 38, 49-50, 128 Sct 586 169 L.Ed. 2d 445 (2007); see also United States v. Millan-Isaac 749 F.3d 57, 68 (1st Cir. 2014) (holding district court's failure to calculate defendant's guidelines sentence range is "serious procedural error")

The guidelines cannot be the courts only consideration, however. Gall, 552 US at 49, 128 Sct 586 The sentencing court must also consider the sentencing factors in 18 USC § 3553(a) including the nature of the offense, the history and characteristics of the defendant and the goals of deterrence and protection of the public.

To determine what sentence is "sufficient, but not greater than necessary." 18 USC § 3553(a)

The court must make an "individualized assessment based on the facts presented" about whether to vary upward or downward from the guidelines sentencing range. See Gall 552 US at 50, 128 Sct 586

In doing so the court may not presume that the guidelines range is reasonable. Id at 49-50 128 Sct 586

District courts are entitled to vary from the guidelines sentencing range not only on the basis of individualized determinations specific to each defendant, but also on the basis of a categorical policy disagreement [REDACTED] with the guidelines themselves. The Supreme Court held in Kimbrough that a district court could deviate on policy grounds from 100:1 ratio for crack and powder cocaine in the guidelines. Kimbrough 552 US at 106-07, 110 128 Sct 558. The court clarified this holding in Spears v. United States 555 US 261 129 Sct 840 172 L.Ed.2d 596 (2009). In Spears the Supreme Court stated that Kimbrough recognized "district courts' authority to vary from crack cocaine guidelines based on a policy

disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case" Spears 555 US at 264  
129 S at 840

The First circuit has interpreted Kimbrough as empowering a sentencing court to disagree with guidelines other than the crack cocaine guidelines that were at issue in that case. United States v. Stone 575 F.3d 83, 89 (1st Cir 2009). In fact a sentencing court commits procedural error if it fails to acknowledge its discretion to vary from the guidelines sentencing range based on a categorical policy disagreement. Id.

The guidelines at issue here are those determining a defendant's base offense level according to the quantity and purity of methamphetamine involved. See USSG § 2D1.1(c) (drug quantity table). Base offense levels for federal drug crimes are calculated accordingly to the drug quantity table in the guidelines, which uses a graduated scale based on the

Type and quantity of drugs involved. See id.  
Methamphetamine is quantified based on purity. See id.

The guidelines refer to three categories of Methamphetamine according to relative purity: methamphetamine, Methamphetamine (actual), and Ice. See USSG § 2D1.1 (c). Notes to Drug Quantity Table (B)-(C) "Methamphetamine" refers to gross weight of a mixture containing a detectable amount of methamphetamine (hereinafter referred to as "methamphetamine mixture"). See id. at Notes to Drug Quantity Table (A) "Methamphetamine"

(actual)" denotes the weight of actual methamphetamine contained in the mixture (hereinafter referred to as "actual methamphetamine"). See id. at (B). "Ice" means the weight of a mixture of at least 80% purity. Id. at (C). The guidelines direct the court to determine a defendant's base offense level using either the total weight of methamphetamine mixture or the weight of the actual methamphetamine contained within the mixture, whichever results in the greater base offense level.

See id. at (B) 'actual' methamphetamine and 'ice' are treated identically under the guidelines, i.e., the same weights of ice and actual methamphetamine result in the same base offense levels. See e.g., USSG § 2D1.1(c)(3) (500 grams of actual methamphetamine and 500 grams of ice both qualify for base offense level of 34.)

The guidelines establish a 10:1 ratio in their treatment of quantities of methamphetamine mixture and actual methamphetamine or ice. For example, 5 kilograms of methamphetamine mixture, 500 grams of actual methamphetamine, and 500 grams of ice are all treated the same way under the guidelines: all receive a base offense level of 34.<sup>2</sup> See id.

The government argues, and the court agrees that the 10:1 ratio at issue here is not a ratio based on different forms of methamphetamine. Rather the applicable statutes and guidelines distinguish between between different concentrations of methamphetamine in a mixture.

See United States v. Stoner, 927 F.2d 45, 47 (1st Cir. 1991) (rejecting defendant's argument that statute distinguished between "pure" methamphetamine and methamphetamine mixture as different forms of the drug.) In this way, the ratio imposed by the methamphetamine guidelines is different from the 100:1 crack cocaine ratio at issue in Kimbrough. While the guidelines distinguish between two forms of cocaine (cocaine and cocaine base/crack), they do not distinguish between different forms of methamphetamine. See USSG § 2D1.1(c). Despite the differences between the guidelines governing methamphetamine and cocaine, the government concedes that—as applied—there is a 10:1 ratio between quantities of actual methamphetamine and methamphetamine mixture that result in the same base offense level. That 10:1 ratio is the focus of motion.

argues that this court should categorically reject, on policy grounds, the 10:1 ratio between quantities of actual methamphetamine and methamphetamine mixture in the guidelines. A growing number of district courts have declared a categorical policy disagreement

with the purity-driven methamphetamine guidelines. See United States v. Saldana No. 1:17-cr-271-1, 2018 U.S. District LexIS 110790, at \*7-10 (W.D. Mich. July 3 2018); United States v. Hoover No. 4:17-CR-327-BLW, 2018 WL 5924500, at \*4 (D. Idaho Nov 13 2018) (Winmill, J.); United States v. Ferguson NO: CR 17-204 (JRT/BRT), 2018 WL 3682509, at \*3-4 (D. Minn. Aug 2 2018); United States v. Harry, 313 F. Supp. 3d 969, 974 (N.D. Iowa 2018) (Strand, J.); United States v. Nawanna, 321 F. Supp. 3d 943, 955 (N.D. Iowa 2018) (Bennett, J.); United States v. Ibarra-Sandoval, 265 F. Supp. 3d 1249, 1256 (D.N.M. 2017).<sup>2</sup> This court finds the collective reasoning employed in these decisions persuasive and joins them by declaring a categorical policy disagreement with the methamphetamine guidelines for the following reasons: (1) there appears to be no empirical basis for the sentencing commissions harsher treatment of offenses involving higher purity methamphetamine; (2) methamphetamine purity is no longer an accurate indicator of a defendant's role in a drug-trafficking conspiracy; and (3) the methamphetamine guidelines create unwarranted sentencing disparities between methamphetamine offenses and offenses involving other major drugs.

## I. Lack of Empirical Justification

The supreme court has acknowledged that the sentencing commission plays an important institutional role: "It has the capacity courts lack to base its determinations on empirical data and national experience guided by professional staff with appropriate expertise" Kimbrough 552 US at 109, 128 Sct 558 (internal quotation marks omitted). In general, the commission has used its empirical and experiential approach to develop sentencing guidelines that reflect a fair sentencing range. See id at 96, 109, 128 Sct 558. However, where the guidelines are not the result of the commission's exercise of its characteristic institutional role (reliance on empirical studies and data), the guidelines are a less reliable estimation of a fair sentence and are therefore entitled to less deference. See id at 109-10, 128 Sct 558 (holding that district courts could deviate from crack cocaine guidelines given that those guidelines did not "exemplify the commission's exercise of its characteristic institutional role")

The commission did not exercise its institutional role and rely upon empirical data develop the guidelines to the statutory mandatory minimum sentences that congress established for [drug offenses] "Gall, 552 U.S. at 46 n.2, 128 S.Ct. 586 U.S.S.G. § 2D1.1 comment 8(A) ("The commission has used the sentences provided in and equivalences derived from, the statute (21 USC § 841(b)(1)), as the primary basis for the guidelines sentences.") See also Hayes, 948 F.Supp.2d at 1083-25 1027 (reviewing extensive history of methamphetamine guidelines and concluding that they "were crafted by congressional directive and not precise analysis and empirical research")

The government does not dispute that, in establishing the methamphetamine guidelines, the commission began with congress's mandatory minimums and made no effort to use empirical data to deviate from congress's judgment. Additionally, many courts have noted that no empirical data appears to justify the guidelines 10:1 ratio. See, e.g. Harry, 313 F.Supp.3d at 972-73; Saldivar, 2018 U.S. Dist. Lexis 110790, at \*4; Hartle, 2017 WL 2608221, at \*2. The commission's departure

From Its characteristic Institutional role and the dearth of empirical data Justifying The 10:1 ratio support This Courts policy Disagreement with The purity-driven Methamphetamine guidelines. The government counters That The real issue Is not whether The commission Fulfilled Its Traditional Institutional role In Formulating The guidelines, But whether Congress's mandatory minimum Sentences are correct. The court disagrees. The court does not have discretion To deviate From The minimum mandatory sentence established In ~~21 USC § 841(b)(1)~~  
But It does have The authority To disagree with The guidelines promulgated by The commission, especially where The guidelines at Issue "do not exemplify The commissions exercise of Its characteristics Institutional role"

Kimbrough, 552 US. at 109, 128 S.Ct 558

## II. Purity as a proxy for culpability

The assumption underlying the guidelines' higher base offense levels for higher purity drugs is that purity "is probative of the defendant's role or position in the chain of distribution." USSG § 2D1.1, comment 27C. In the commentary to the guidelines governing drug offenses the commission explained: "since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent in the criminal enterprise and proximate to the source of the drugs." Id. This rationale provides the justification for the guidelines' consideration of purity in setting base offense levels for some drugs, like methamphetamine. See id.; see also Ibarra-Sandoval, 265 F.Supp.3d at 1255 (acknowledging that comment 27C explains the rationale for purity-based methamphetamine guidelines); Navarria, 321 F.Supp.3d at 951 (same); Saldana, 2018 U.S. Dist. Lexis 110790, at \* 5-6 (same). For other drugs like heroin, where purity is not considered in setting the base offense level, this rationale justifies an upward departure based on purity. See USSG § 2D1.1, comment 27C.

The assumption underlying the methamphetamine guidelines - that purity indicates that a defendant is close to the source of drugs and therefore played a leadership role in the conspiracy - is divorced from current market reality. In its 2018 National Drug Threat Assessment, the Drug Enforcement Administration found that the average purity of methamphetamine between 2013 and 2017 was over 90%. Indeed the average purity of methamphetamine sampled in 2017 was even higher at 96.9%. The government does not dispute these statistics. In fact, counsel for the government does not dispute these statistics. In fact, counsel for the government noted anecdotally that his own experience would corroborate the fact that the average purity of New Hampshire methamphetamine is over 90%.

Average methamphetamine purity has not always been this high. Between the 1980's and 2007 the average purity of methamphetamine fluctuated between approximately 30% and 80%. Consequently, at one time the guidelines' harsher treatment of higher purity methamphetamine was more grounded in fact. See Nwanna 321 F. Supp. 3d at 951 (noting that there was once some truth to the

assumption that high purity indicates greater culpability) Now, however that is no longer the case due to the consistently high average purity of methamphetamine.

In the current market the purity of methamphetamine does not necessarily reflect a defendant's role in the distribution chain. Low level street dealers are just as likely as so called "king pins" to have access to and to be charged with distribution of extremely pure methamphetamine in effect then the purity-based methamphetamine guidelines are treating all defendants as king pins even though that is not necessarily true. See, e.g. Saldana, 2018 US Dist. Lexis 110790, \*9. (Explaining that guidelines "subject all defendants to harsh treatment, regardless of a particular defendant's role and regardless of any sentencing enhancements already accounting for a defendant's role in the offense") United States v. Ortega No. 8:09CR400, 2010 WL 1994870, at \*7 (D. Neb. May 17 2010) ("The [10:1] ratio illogically skews sentences for 'average' defendants to the upper end of the sentencing spectrum, blurring the distinctions between high and low level distributors in a hierarchy")

Indeed The government agreed That, due To The high average purity OF methamphetamine essentially every methamphetamine will be charged as involving actual methamphetamine rather Than a methamphetamine mixture The harsher Treatment of nearly all defendants on one Factor - purity - obscures other Factors and creates "False uniformity". Cf United States v. Cabral 567 F. Supp. 2d 271, 273 (D. Mass. 2008). ("False uniformity occurs when we treat equally individuals who are not remotely equal because we permit a single consideration, like drug quantity, to mask other important factors") For These reasons, The court concludes That The purity OF methamphetamine Is no longer an accurate indicator of culpability and The court agrees with Those Courts That have expressed a policy disagreement with The purity driven methamphetamine guidelines. See Nauhnik 321 F. Supp. 3d at 951-54; Soltana 2018 US Dist. Lexis 110790 \* 8; Ferguson 2018 WL 3682502, at 4; Ibarrá-Sánchez 265 F. Supp. 3d at 1255; Hartle, 2017 WL 2608281, at \* 3-4

### III UNWarranted Sentencing Disparities

Methamphetamine offenses receive more severe sentences than any other drug. See Nawanna 321 F. Supp. 3d at 953-54 (reviewing Sentencing Commission's 2017 statistics regarding methamphetamine sentences.) The average length of imprisonment for methamphetamine offenders in 2017 was 91 months, higher than for any other drug including heroin. Id. at 953. This disparity in sentencing between methamphetamine and other drug offenses arises from the fact that the guidelines provide higher base offense levels for actual methamphetamine than from other comparable drugs. The guidelines' higher base offense levels for actual methamphetamine combined with the ubiquity of high purity methamphetamine in the market result in more severe sentences for methamphetamine offenders.

By way of illustration, 500 grams of actual methamphetamine earns a base offense level of 34 while the quantities of other drugs result in lower base offense levels: fentanyl (30), cocaine base (crack) (30), heroin (26) and cocaine (24). See USSG § 2D1.1(c). By contrast, the base offense level for 500 grams of methamphetamine mixture is 30 - a level more comparable to that advised for the quantity of other major drugs. See Id.

Comparable To That advised For The same quantity OF Other major Drugs see id.

These disparities IN Base offense levels result IN Corresponding disparities IN guidelines sentence ranges. As a hypothetical, consider a defendant convicted of distributing 500 grams of a controlled substance Assuming only a Three level decrease For acceptance OF responsibility and a criminal History category of IV. The Following guidelines sentence ranges would result:

The government agreed at the hearing That actual methamphetamine IS penalized more severely by weight Than any other major Drug. at least one other court has noted That no empirical evidence supports This harsher Treatment OF actual methamphetamine as compared To other drugs. see Hasty, 313 F.Supp. 3d at 973.

The government provided no such evidence IN This case. For all these reasons This Court Finds That The guidelines' harsher Treatment OF actual methamphetamine as compared To other drugs is unsupported by empirical data and runs contrary TO The "need TO avoid unwarranted sentencing Disparities among defendants with similar records who have been found guilty OF Similar conduct" 18 USC § 3553(a)(6).

## IV procedure To Implement categorical policy disagreements

For The reasons discussed above, The court disagrees as a matter of policy with The purity - Driven 10:1 disparities Between The calculation of Base OFFense levels Using The weight of actual methamphetamine Versus The weight of methamphetamine mixture. The court agrees with Those courts That have expressed This disagreement by recalculating The Base OFFense levels For methamphetamine OFFenses more In line with Those of comparable drug-TraFFicking OFFenses This approach will also remove The purity enhancement now present IN all methamphetamine cases due To The high average purity OF methamphetamine.

a critical question remains: how Best To Implement This policy disagreement? while The supreme court has laid out a Two-step process For sentencing, See Gall, 552 U.S. at 49-50, 128 S.Ct. 586 Millan Isaac, 749 F.3d at 66. It has not yet made clear how a sentencing Judge Should Implement a categorical policy disagreement with The guidelines. By way OF brief summary, The Two-step process IS as follows: First a sentencing court Court starts By correctly calculating The guidelines

Sentencing range. Gall 552 U.S. at 49, 128 S.Ct. 586. The First step provides the "Initial benchmark" Id. or "anchor" Peugh v United States 569 U.S. 530, 549, 133 S.Ct. 2072 186 L.Ed.2d 84 (2013) at the Second step, a court must make an individualized assessment, weighing the factors in 18 USC § 3553(a) against the prescribed guideline range to reach a fair sentence in each case. Gall 552 U.S. at 49-50 128 S.Ct. 586. The courts central task is to impose a sentence in [redacted] that is "sufficient but not greater than necessary" to address all the goals of sentencing 18 USC § 3553(a). Once the judge decides on a sentence they must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing" Gall 552 US at 50, 128 S.Ct. 586.

The Supreme Courts decision in Spears provides some guidance on the question of how best to implement a policy based variance. In Spears, the court upheld a sentencing judges categorical policy disagreement with the 100:1 ratio in a crack cocaine case and use of a substitute

ratio(20:1). Spears 555 U.S. at 265-66 129 SCt 840  
The court explained that it is not "an acceptable sentencing practice" to apply the substitute ratio (20:1) as part of the sentencing judges individualized assessment made under § 3553(a).  
Id. at 266 129 SCt 840. Indeed, the court described such an approach as a judge "masking" their policy disagreement as an individualized determination - which the court characterized as "institutionalized [redacted] subterfuge" Id.

To accomplish the transparency required of the sentencing process, the court should, therefore, avoid a procedure that collapses its policy disagreement into its individualized determination. adding a separate analytical step between step one (the calculation of the guidelines range) and step two (the individualized assessment under § 3553(a)) will address this concern. specifically after calculating the guidelines at step one, the court will, at the next step, recalculate the guidelines using the base offense level for the methamphetamine mixture guidelines maximum transparency.

IS achieved IF this second step occurs before  
The individualized assessment at the Third and  
Final step.

This New Three step process makes since based  
on the nature OF the court's policy disagreement  
here The court disagrees with the parity-driven  
ratio used To calculate a defendant's Base  
OFFense level IN methamphetamine cases.  
This disagreement will exist IN every case where  
The step-one calculation of the base OFFense level IS  
made using The actual methamphetamine guidelines  
ratio(10:1). The disagreement will Take The Form of  
a policy-Based Variance That IS wholly Independent  
OF The Individual defendant's unique circumstances  
and characteristics. In short every application  
OF The policy ~~is~~ disagreement would result IN  
a policy-Based Variance Independently and  
seperately From Its consideration OF a defendant's  
Individualized characteristics.

accordingly, The court will use The Following  
Sentencing methodology IN all actual methamphetamine  
and ICE cases.(i)

Calculate The guidelines sentencing range using The purity - driven methamphetamine guidelines; (2) recalculate The guidelines using The base offense level for the same quantity of methamphetamine mixture; and (3) evaluate whether any upward or downward variances are appropriate based upon The individual characteristics of The defendant and The other § 3553(a) Factors. The court will apply This approach in all actual methamphetamine and ice cases regardless of whether the defendant request The court to do so.

Other district courts have adopted this same three-step approach. See Harry, 313 F.Supp.3d at 974 (rejecting court's own prior "ad hoc" approach to applying policy disagreement and declaring that it would in all actual methamphetamine and ice cases, engage in a separate analytical step to determine the guidelines range based on methamphetamine mixture guidelines); Saldana 2018 US Dist. Lexis 110790 at \*11 ("The court's methodology for sentencing [redacted] in methamphetamine cases will be to treat all methamphetamine quantities

as mixtures") See also United States v. Gully  
619 F. Supp. 2d 633, 644-45 (U.S. Ct. Iowa 2009)  
(Adopting Three step sentencing analysis to  
Implement policy disagreement with crack-powder  
Cocaine guidelines); Michelman, Doing kimbrough  
Justice Supra at 1105 n.19 (Collecting cases that  
Implemented policy disagreement with guidelines by  
adding Intermediate analytical step Between The  
Two step Identified IN gall).

The government urges The court NOT To apply a  
categorical policy disagreement IN all  
methamphetamine cases For several ~~reasons~~ reasons  
First It argues That It will engender Intra-district  
disparities IN sentencing IN methamphetamine cases  
However The supreme court rejected The same  
argument IN kimbrough see kimbrough 552 U.S. at  
107-08, 128 Sct 558. The court observed That  
although uniformity remains "an important goal OF  
Sentencing" Some departures From uniformity are  
a "Necessary Cost" OF The courts Ruling That  
The guidelines are merely advisory and Its recognition  
OF district courts discretion over sentencing

Id It further noted that variations among district courts are "constrained by the mandatory minimums Congress prescribed" Id at 108 108 S.Ct 558

Second the government contends that the court's application of this policy disagreement in all methamphetamine cases will make it more difficult for the government to administer a coherent policy regarding sentencing departures under USSG § 5K and negatively impact a defendant's incentive to accept responsibility and/or plead guilty. Those issues, however, are not for the court to resolve. The court's role is to impose a fair and just punishment in every case.